FILED
APR 28 1971
E. ROBERT SEAVER, CLERK

No 70-5015

IN THE

Supreme Court of the United States

October Term, 1970

~~No. 5798~~

JOHN RICHARD ARGERSINGER,

Petitioner,

vs.

RAYMOND HAMLIN, Sheriff of Leon County, Florida,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Florida

BRIEF OF
THE LEGAL AID SOCIETY OF NEW YORK,
AMICUS CURIAE

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Harvey v. Mississippi, 340 F. 2d 263 (5th Cir. 1965) 8
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James v. Headley, 410 F. 2d 325 (5th Cir. 1969) 8
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People v. Berrios (argued before New York Court of Appeals, March 2, 1971) 24
People v. Brown, New York Law Journal, October 10, 1969, p. 2, col. 4 (App. term, 1st Dept.) 20
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People v. Delgado, New York Law Journal, Dec. 17, 1970, p. 2, col. 1 23
People v. Hanna, New York Law Journal, July 19, 1968 (App. Term, 2d & 11th Jud. Dist.) 23
People v. Harris, 64 Misc. 2d 510, 315 N.Y.S. 2d 66 (App. Term, 1st Dept. 1969) 21
People v. Heins, New York Law Journal, Oct. 26, 1970, p. 2, col. 3 (App. term, 1st Dept.) 20

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People v. Markowitz, 18 N.Y. 2d 953, 223 N.E. 2d 572 (1966) 22
People v. McCaskill, New York Law Journal, June 26, 1970, p. 2, col. 3 (App. term, 1st Dept.) 21
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People v. Pagnotta, 25 N.Y. 2d 333, 253 N.E. 2d 202 (1970) 21
People v. Peters, New York Law Journal, Jan. 7, 1971, p. 2, col. 1 (App. term 1st Dept.) 20
People v. Rosemond, 26 N.Y. 2d 101, 257 N.E. 2d 23 (1970) 23
People v. Salgado, New York Law Journal, April 6, 1970, p. 2, col. 2 (App. term, 1st Dept.) 23
People v. Schwartz, New York Law Journal, Dec. 17, 1970, p. 2, col. 1 (App. term, 1st Dept.) 20
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People v. Soto, New York Law Journal, Nov. 3, 1969, p. 2, col. 1 (App. Term, 1st Dept.) 23
People v. Tolliver, New York Law Journal, June 17, 1970, p. 2, col. 5 (App. Term, 1st Dept.) 23
People v. White, 16 N.Y. 2d 270, 213 N.E. 2d 438 (1965), cert. den. 386 U.S. 1008 23
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United States v. Barnett, 376 U.S. 681, 748-50 (Mr. Justice Goldberg dissenting) 12
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White v. Maryland, 373 U.S. 59 (1963) 10

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N.Y. County Law, §722-b (11 McKinney's Consol. Laws of N.Y. 1970) 2

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New York Penal Law:

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North Dakota Cent. Code §40-18-01 (1968) 15

Miscellaneous Authorities:

Amsterdam, *Federal Constitutional Restrictions in the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like,* 3 Crim. L. Bull. 205 (1968) 19

Appellant's Brief, Baldwin v. New York, 399 U.S. 66, pp. 26-28, App. C. pp. C-1-C-6 25

Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices,* 1960-62, 4 Crim. L. Bull. 549 (1968) 24

Douglas, *Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1 (1960) 19

Foote, *Vagrancy-Type Law, and Its Administration,* 104 U. Pa. L. Rev. 603 (1956) 19

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Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury,* 39 Harv. L. Rev. 917 (1926) 9

Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal,* 38 Legal Aid Briefcase 151 (1970) 22

James, Crisis in the Courts 4 (1968) 14

Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685 (1968) 8, 9

Katz, *Municipal Courts—Another Urban Ill.,* 20 Case West L. Rev. 87 (1968) 14

Kessler, *Judging the Judges,* The Wall Street Journal, Dec. 7, 1967, p. 1, col. 1 15

Newman, CONVICTION 198 (1966) 24

N.Y. Times, Nov. 2, 1970, p. 49, col. 6 21

N.Y. Times, April 13, 1971, p. 44 13

Note, *Constitutional Limitations in the Conditions of Pretrial Detention,* 79 Yale L.J. 941 (1970) 26

Note: *Metropolitan Criminal Courts of First Instance,* 70 Harv. L. Rev. 320 (1956) 14

Order Prescribing Rules of Procedure for the Trial of Minor Offenses Before Magistrates, 400 U.S. 1031-36 (Statement of Mr. Justice Black) 11

Order Prescribing Rules of Procedure For The Trial of Minor Offenses Before Magistrates, Rule 3(b), 400 U.S. 1037-42 (Jan. 27, 1971) 11

Police Practices in Narcotics Cases, 4 Colum. J. Law & Soc. Prob. 87 (1968) 24

President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS (1967) 12, 13, 15

President's Commission on Law Enforcement and the Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967) 13

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REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (Bantam Ed. 1968) 19

Shaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956) 5

1 Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 123 (1883) 12

Wright, *The Courts Have Failed the Poor*, N.Y. Times [Magazine] March 9, 1969, p. 100 19

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BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

Interest of Amicus *

The Legal Aid Society is a non-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance to persons too poor to afford the services of legal counsel. By virtue

* Letters of Consent have been obtained from petitioner's counsel and from the Attorney General of the State of Florida and are on file with the Clerk of the Court.

of its contract with the City of New York, the Society has undertaken to serve, in essence, as the defender agency for the overwhelming majority of indigent persons charged with crime in New York City.

The Society presently employs 200 full-time attorneys in its Criminal Courts Branch and maintains a Criminal Appeals Bureau comprised of 24 full-time attorneys. Of the 189,021 criminal cases handled by the Society in 1970, 152,260 involved misdemeanor and lesser offense prosecutions. Of the 1,170 appeals prosecuted by the Criminal Appeals Bureau, 289 were appeals from convictions in the Criminal Court of the City of New York, the court having jurisdiction over misdemeanors and lesser offenses. N.Y. City Crim. Ct. Act, §31 (29A McKinney's Consol. Laws of N.Y., 1963). As in years past, these figures reflected the heavy involvement of the Society's Criminal Branch in the representation of poor people charged with lesser offenses.[1]

It is the purpose of this brief to assist petitioner in persuading the Court that the Sixth and Fourteenth Amendments must be construed to guarantee the right to

1. Under New York law, representation of indigents accused of any crime punishable by imprisonment other than a traffic infraction, is afforded on a state-wide basis. Article 18-b of the New York County Law, which establishes various plans for assigned counsel systems, defines crime for the purpose of such provision as "a felony, misdemeanor, or the breach of any law or ordinance of a political subdivision of this state, other than one that defines a 'traffic infraction' for which a sentence to a term of imprisonment is authorized upon conviction thereof." N.Y. County Law, §722-b (11 McKinney's Consol. Laws of N.Y., 1970).

The statute is consonant with the right to counsel decreed by the New York Court of Appeals. Compare, *People* v. *Witenski*, 15 N.Y. 2d 392, 207 N.E. 2d 358 (1965) with *People* v. *Letterio*, 16 N.Y. 2d 307, 213 N.E. 2d 670 (1965), cert. den. 384 U.S. 911.

counsel to all persons facing deprivation of their liberty because of an accusation of criminal conduct. In support of our constitutional argument, we will endeavor to convey to the Court what we have learned experientially from our intensive involvement over the years in the representation of indigents accused of misdemeanors and lesser offenses—an involvement which leads us to conclude that the importance of the right to counsel in such cases is as critical, and possibly more so, than in felony cases. Because we so believe, we are also concerned with the effect of an adverse ruling in petitioner's case upon the continued existence of the extensive guarantees of the assistance of counsel now provided by New York law.

Summary of Argument

The assistance of counsel in a criminal prosecution, guaranteed by the Sixth Amendment, is an indispensible condition of the right to a fair trial in our adversary system. Since *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) was decided, this Court has not limited the right to counsel by virtue of the nature of the crime charged or the length of sentence that could be imposed. Nor has the Court permitted a man's poverty to serve as a basis for denial of constitutional safeguards mandated for criminal prosecutions. The extent of the Sixth Amendment's guarantee of counsel is not measurable by the extent of the right to trial by jury, either historically or functionally. This Court's decisions recognize that a trial without a jury can be fair but conclude otherwise where the right to counsel is at issue. Moreover, apart from the right to trial by jury, no other Sixth Amendment guarantee has ever been

confined to criminal prosecutions for "serious" offenses. The Court has also consistently refused to accept arguments of lack of resources by States and municipalities as grounds for limiting the meaning of the Constitution.

For many reasons, the right to counsel in "petty" offense prosecutions is as critical, if not more so, than in felony cases. The quality of justice administered at the lower criminal court level throughout the United States is far poorer than at the felony level. Inadequate facilities, procedural laxity and judicial arbitrariness are patent and widespread. Our own experience leads us to conclude that the incidence of legal error and conviction of the innocent is far more prevalent in lesser offense prosecutions than in felony cases, even when counsel is present. Also, the legal and constitutional questions involved in this class of cases are no less complex than in felony matters. Counsel's assistance is also essential to the guilty plea process which is the major mode of disposition. The collateral consequences of minor offense convictions can be serious, especially to poor persons, since they frequently affect eligibility for occupational callings and public benefits such as government housing.

In short, the notion that a fair trial can be had in the lower criminal courts without counsel is untenable and no person should be subjected to confinement, in prisons that are of the poorest quality, without a determination of guilt that has met the test of our adversary process.

ARGUMENT

The Due Process and Equal Protection Clauses of the Fourteenth Amendment and the right to counsel provision of the Sixth Amendment require that a poor person be guaranteed the assistance of counsel when charged with any crime for which he can be imprisoned.

I

At this point in our constitutional history, the signal importance of the right to counsel in criminal prosecutions is one of those few issues that can be approached with certainty. As our system is an adversary one, the right to counsel is the only means by which all other constitutional rights can be secured.[2] Thus, in *Rideau* v. *Louisiana,* 373 U. S. 723 (1963) the Court wrote:

> Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. 373 U. S. at 726-27.

With the exception of *Betts* v. *Brady,* 316 U. S. 455 (1942) and its progeny, the essentiality of counsel to the fair functioning of our system has consistently been declared by the Court—without concern for the nature or seriousness of the crime charged. *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Johnson* v. *Zerbst,* 304 U. S. 450, 462 (1938); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Patterson* v. *Warden,* 372 U. S. 776 (1963); *In re Gault,* 387

2. Shaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

U. S. 1 (1967). Rather, the Court's many decisions extending the right to counsel signify the homage paid to Mr. Justice Sutherland's exegesis of that right in *Powell* which, because of its classic quality, bears repetition:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. 287 U. S. at 68, 69.[3]

Thus the recognition in *Gideon* that,

> * * * reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us an obvious truth. 372 U. S. at 344.

3. When it is remembered that Mr. Justice Sutherland wrote of the complexities of the "science of the law" well in advance of what has come to be known as the "Criminal Law Revolution," the prescience of his observations becomes immeasurable. Later in our brief we will attempt to show the Court how the wisdom of these observations is especially manifested in misdemeanor and lesser offense prosecutions.

Of equal significance has been the Court's consistent refusal to permit a man's poverty to serve as the basis for denying him rights otherwise available to persons accused of crime. *Griffin* v. *Illinois,* 351 U. S. 12, 19 (1956) ["There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."]; *Eskridge* v. *Washington State Board,* 357 U. S. 214 (1958); *Burns* v. *Ohio,* 360 U. S. 252 (1959); *Smith* v. *Bennett,* 365 U. S. 708 (1961); *Douglas* v. *California,* 372 U. S. 905 (1963); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Seals* v. *Alabama,* 380 U. S. 254 (1965); *Long* v. *District Court,* 385 U. S. 192 (1966); *Tate* v. *Short,* —— U. S. ——, 39 U.S.L.Wk 4301 (March 2, 1971).

Of particular relevance is the recent decision in *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969), in which, on equal protection grounds, the Court rejected the State's position that an indigent could be denied a free transcript of his conviction for violation of a municipal ordinance for purposes of appeal because it was a "petty offense."

The State of Florida now asks this Court to deny a poor person the right to the assistance of counsel when punishment for the crime charged would not exceed six months imprisonment. Such a result would be entirely inconsistent with the foregoing principles.

To accept Florida's position also would require a determination that the right to counsel guaranteed by the Sixth Amendment is commensurate with only one other Sixth Amendment right, that of trial by jury. There is neither historical nor constitutional basis for such an assumption, which many courts, both State and federal, have

rejected. *E.g. James* v. *Headley,* 410 F. 2d 325, 331-33 (5th Cir. 1969); *Application of Stevenson,* 458 P. 2d 414, 418 (Ore. 1969); *State* v. *Borst,* 154 N.W. 2d 888 (Minn. 1967).[4] Our own Court of Appeals, which sustained a limitation of the right to trial by jury in New York City to crimes punishable by more than one year's imprisonment,[5] much earlier held that "the right to counsel must be made meaningful and effective in criminal courts on every level." *People* v. *Witenski,* 15 N.Y. 2d 392, 395, 207 N.E. 2d 358 (1965).

Application of the Sixth Amendment's jury trial standard as the measure of the right to counsel will simply not withstand analysis. As the Fifth Circuit has pointed out,

> [b]ecause a charge is petty enough to be outside the jury-trial requirement does not mean that it is also petty enough to allow suspension of the right to counsel. The petty-offense exception has not been applied uniformly to all Sixth Amendment rights. On the contrary, In re Oliver, 1948, 333 U. S. 257, held the Sixth Amendment right to a public trial to be applicable to state proceedings although only a 60-day sentence was involved. An "accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." 333 U. S. at 272. *James* v. *Headley, supra,* 410 F. 2d at 332.

In *Groppi* v. *Wisconsin,* 400 U. S. 505 (1971), the Court did not premise the right to an impartial jury on the

4. Many courts have extended the right to counsel for all misdemeanors without even considering the limitations of the jury trial provision. E.g. *Harvey* v. *Mississippi,* 340 F. 2d 263 (5th Cir. 1965). For a state by state breakdown see Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, 719-734 (1968).

5. *Matter of Hogan* v. *Rosenberg,* 24 N.Y. 2d 207, 247 N.E. 2d 260 (1969), rev'd *sub nom., Baldwin* v. *New York,* 399 U.S. 66 (1970).

seriousness of the crime charged but upon "the nature of the jury trial that the Fourteenth Amendment commands, when trial by jury is what the State has purported to accord." 400 U. S. at 508. Nor has the Court ever limited to serious offenses the other guarantees in the Sixth Amendment—to be informed of the nature of the charges, confrontation and cross-examination, and compulsory process—and we feel safe in concluding that the Court would decline to do so. See Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, 705-707 (1968).

Historically, the limitation of the right to trial by jury to non-petty offenses has an independent genealogy unrelated to the development of the right to counsel. See, *Baldwin* v. *New York, supra,* 399 U. S. 66 (1970); *Duncan* v. *Louisiana,* 391 U. S. 145, 161 (1968); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury,* 39 Harv. L. Rev. 917 (1926). No parallelism exists where the right to counsel is concerned. The right to assigned counsel actually begins with *Powell,* detours with *Betts,* and flourishes in *Gideon.* Moreover, a person who could afford to retain counsel has always been entitled to do so even though the charge be one of petty offense. *Powell* v. *Alabama, supra,* 287 U. S. at 68.

Why no such parallel can or ought be constitutionally drawn as to the right to counsel, is, that unlike the right to trial by jury, the assistance of counsel is a prerequisite to the very existence of a fair trial. This functional distinction was the very basis for the disparate treatment afforded the right to jury trial from the right to counsel when problems of retroactivity arose. In limiting the application of *Duncan,* the Court refused to assume that a trial before

a judge, rather than a jury, could not have been fair, and concluded, therefore, that the absence of a jury did not diminish the efficacy of the fact-finding process. *DeStefano* v. *Woods,* 392 U. S. 631 (1968). However, *Gideon* was deemed retroactive because of the Court's belief that the absence of counsel did affect the integrity of the guilt-determining process. *Pickelsimer* v. *Wainwright,* 375 U. S. 2 (1963); *Johnson* v. *New Jersey,* 384 U. S. 719, 727-28 (1966); *Arsenault* v. *Massachusetts,* 393 U. S. 5 (1968); *McConnell* v. *Rhay,* 393 U. S. 2 (1968); *Williams* v. *United States,* —— U. S. ——, 9 Cr. L. Rep. 3015, 3017 (April 7, 1971).

That the presence of counsel is part and parcel of a fair trial is also manifested in the Court's persistent refusal to search the record of a trial for prejudice, once the right to counsel is shown to have been violated. *Glasser* v. *United States,* 315 U. S. 60, 75, 76 (1942); *Chandler* v. *Fretag,* 348 U. S. 3 (1954); *Reynolds* v. *Cochran,* 365 U. S. 525, 531 (1961); *Chewning* v. *Cunningham,* 368 U. S. 443, 447 (1962); *White* v. *Maryland,* 373 U. S. 59 (1963); *United States* v. *Wade,* 388 U. S. 218, 236 (1967); *Chapman* v. *California,* 386 U. S. 18, 23 (1967); but see, *Chambers* v. *Maroney,* 399 U. S. 42, 53-54 (1970).

Florida's position, devoid as it is of constitutional strength, thus rests solely on an argument of expedience, such as that propounded by the majority below—that the Constitution does not compel the State to "hand out to them [the lowest echelons of petty offenders] the free services of an elaborate and expensive public defendant system. * * *" 236 So. 2d at 444.

In securing to all persons rights guaranteed by the Constitution however, the Court has rejected at every turn,

arguments that have urged limitations *in the definition* of constitutional rights based upon assertions of unavailable resources by the States. *Griffin* v. *Illinois, supra,* 351 U. S. 12; *Gideon* v. *Wainwright, supra,* 372 U. S. 335; *Douglas* v. *California, supra,* 372 U. S. 353; *Baldwin* v. *New York, supra,* 399 U. S. 66; *Shapiro* v. *Thompson,* 394 U. S. 618, 633 (1969); *Boddie* v. *Connecticut,* —— U. S. ——, 39 U.S.L.Wk 4294 (March 2, 1971).

In short, the meaning of the Sixth Amendment and Due Process Clause does not fluctuate in proportion to the number of persons who seek otherwise justifiable refuge in them. The rights afforded by the Constitution are personal rights "which the State must respect, the benefit of which every person may demand. * * * [I]ts safeguards extend to all." *Hill* v. *Texas,* 316 U. S. 400, 406 (1942).[6]

II

Extending the right to counsel to all misdemeanor convictions, the Minnesota Supreme Court observed that

> [a] defendant in court on a charge defined as a misdemeanor is as helpless to defend himself as he would be if he were charged with a gross misdemeanor or felony. *State* v. *Borst, supra,* 154 N.W. 2d at 893.

6. We are, of course, puzzled and concerned about the thrust of that portion of the Court's recent order prescribing rules for the trial of minor offenses before federal magistrates insofar as those rules are subject to an interpretation that a poor person charged with a petty offense other than a minor offense need not be informed of a right to assigned counsel. *Order Prescribing Rules of Procedure For the Trial of Minor Offenses Before Magistrates,* Rule 3(b), 400 U.S. 1037-42 (Jan. 27, 1971). We must assume, however, that the Court has not conclusively determined that such an interpretation and limitation of the right to counsel is constitutional. 400 U.S. 1031-36 (statement of Mr. Justice Black).

That this pronouncement may, indeed, commit only the error of understatement can easily be seen from an appreciation of the workings of the criminal process in the lower criminal courts, for it is the unsatisfactory nature of that process that increases, rather than detracts from, the need for counsel's presence whenever desired by the accused, rich or poor.[7]

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7. Our discussion of the problem of the lower courts will, at times, involve courts which have jurisdiction to try cases punishable by more than six months imprisonment, as does the Criminal Court of the City of New York. This suggests at the outset that the concept of "petty" offense on a nationwide level is a totally unworkable one, for it assumes a tolerably certain and stable definition based on historical notions that offenses punishable by no more than six months imprisonment involve matters of "small importance," "trifling nuisances" of a regulatory nature—*mala prohibita* rather than *mala in se*. 1 Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 123 (1883); *Callan* v. *Wilson*, 127 U.S. 540, 553 (1888); *Shick* v. *United States*, 195 U.S. 65, 69 (1904); *United States* v. *Barnett*, 376 U.S. 681, 748-750 (Mr. Justice Goldberg, dissenting); *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966). Throughout the country, however, categories of offenses classified as misdemeanors and felonies vary and an offense which is a felony or serious misdemeanor in one state may be a lesser offense in another. See, President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS 30 (1967); *District of Columbia* v. *Colts*, 282 U.S. 63 (1930).

Modern penal law revisions also have not retained common law concepts and have attached lesser sentences to crimes punished much more seriously at common law. For example, New York law, recently revised, has no six month sentence for any crime and punishes class A misdemeanors by one years imprisonment and class B misdemeanors by three months imprisonment. In the class B category, however, are crimes such as conspiracy in the fourth degree [P.L. §105.00], menacing [P.L. §120.15], sexual abuse in the third degree [P.L. §130.55], criminal tampering in the second degree [P.L. §145.15], reckless endangerment of property [P.L. §145.25], commercial bribery and bribe-receiving [P.L. §§180.00, 180.05]. Even violations, punishable by only 15 days imprisonment include such crimes as harassment [P.L. §240.25] and criminal solicitation in the third degree [P.L. §100.00]. These are crimes which of course do not fall into the *malum prohibitum* genre and demonstrate that a constitutional limitation on the right to counsel based on the "petty offense" concept would bear little relation to any historical understanding of the term. See *Callan* v. *Wilson*, *supra*, 127 U.S. at 556.

A tragic truth about the lower criminal courts throughout the United States, especially in urban areas, is the degree to which ineptitude, chaos and patent unfairness has become rampant.

In 1967, the President's Commission on Law Enforcement and the Administration of Justice expressed its shock at what it had observed in these courts and it called attention to the "cramped and noisy courtrooms, undignified and perfunctory procedures and badly trained personnel" which were representative.[8]

The Commission also spoke of "assembly-line justice"[9] and trial procedures that bore little resemblance to those usually associated with due process, characterized by an informality that would not be tolerated in a felony trial.[10]

The Commission further pointed out that the extremely poor quality of justice in the lower courts was not a recent phenomenon but that "[s]tudy commissions have pointed out the scandal of the lower criminal courts for over a century."[11]

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8. President's Commission on Law Enforcement and the Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967). Only recently, a judge of the New York City Criminal Court tendered his resignation because of these conditions, *N.Y. Times*, April 13, 1971, p. 44.

9. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra*, n. 8 at 127-128.

10. President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS, *supra*, n. 7 at 30.

11. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra*, n. 8 at 129.

Although the vast majority of Americans have contact with the criminal process only at the lower criminal court level,[12] the quality of the judiciary is exceptionally low. That a substantial portion of municipal court judges are chosen neither for their legal talent nor their compassion but for their service to local political machines is well-known.[13]

The author of a recent study has stated:

> If my sampling is a fair indication (I simply sat down in courtrooms selected at random around the country and listened) perhaps half of the trial judges are, for one reason or another, unfit to sit on the bench.
>
> * * *
>
> [I]n states like Pennsylvania, New York, Kentucky, Texas, Oklahoma, and Indiana where court problems are especially acute (lawyers, prosecutors, policemen and judges) complain that my estimate of the percentage of incompetent judges is far too low.
>
> James, CRISIS IN THE COURTS 4 (1968)

In describing the manner in which "petty offenses" are handled in these courts, the Commission's Task Force found that,

> Judges sometimes seem annoyed at being required to preside in these courts. Defendants are treated with contempt, berated and laughed at, embarrassed, and sentenced to serve their time or work off their fines. Observers have sometimes reported difficulty in determining what offense is being tried in a given

12. Note: *Metropolitan Criminal Courts of First Instance,* 70 Harv. L. Rev. 320 (1956).

13. Katz, *Municipal Courts—Another Urban Ill,* 20 Case West L. Rev. 87, 121 (1968).

case and instances have come to light in which the disposition bears little relationship to the original charge. A trial of a defendant charged by police with drunkenness consisted of this exchange:

> MAGISTRATE: "Where do you live?"
> DEFENDANT: "Norfolk."
> MAGISTRATE: "What are you doing in Philadelphia?"
> DEFENDANT: "Well, I didn't have any work down there, so I came up here to see if I could find * * *"
> MAGISTRATE (who had been shaking his head): "That story's not good enough for me. I'm going to have you investigated. You're a vagrant. Three months in the House of Correction."

TASK FORCE REPORT: THE COURTS, *supra,* at 31.

Even when judges are well trained[14] and/or well-intentioned, the demands placed upon them by persistently heavy caseloads and inadequate auxiliary resources create the threat of their becoming case-hardened and ill-tempered. A student of the New York City Criminal Court thus has written that,

> Lawyers and others who observe Criminal Court say that many judges become cynical, bored or weary after years on the bench, that some of them demean rather than uplift the dignity of the proceedings, that many use bail as a punitive weapon and that a decision may depend less on the merits of the case than on the judge's mood, his opinion of the lawyers involved or the idiosyncrasies of his personality.

Kessler, *Judging the Judges,* The Wall Street Journal, Dec. 7, 1967, p. 1, col. 1.

14. In some states, such as North Dakota, a municipal judge in some instances need not have any legal training at all. N.D. Cent. Code §40-18-01 (1968) [In cities under 3,000 persons no training required and if attorney is unavailable in cities of more than 3,000, then layman may act as a municipal judge].

In 1970, the Legal Aid Society was assigned to 164,461 misdemeanor and lesser offense cases. Of this number, 29,824 were dismissed, 1,593 were transferred to Family Court,[15] and 38,386 resulted in pleas of guilty. Trials were held in 3,100 cases, with 1,400 acquittals and 1,700 convictions.[16]

By contrast, in 1970, the Society was assigned to 12,301 felony cases of which 530 were dismissed and 15 transferred to Family Court. Pleas of guilty were entered in 5,709 cases. Trials were held in 138 cases with 88 convictions and 50 acquittals.[17]

At the outset, these figures indicate that when an urban defender agency does not close its doors to persons charged with less serious offenses, it is called upon to render its greatest service in that area. That such an allocation of legal resources is warranted is observable from the next conclusion our figures entitle us to draw: that an over-

15. Under New York law, the Family Court has original jurisdiction over various criminal acts "between spouses or between parent and child or between members of the same family or household." N.Y. Fam. Ct. Act, §812 (29A McKinney's Consol. Laws of N.Y. 1963). The meaning of the section has been the subject of considerable litigation. *E.g. People* v. *Williams,* 24 N.Y. 2d 274, 248 N.E. 2d 8 (1969); *People* v. *Johnson,* 20 N.Y. 2d 220, 229 N.E. 2d 180 (1967). Many of the criminal acts which would divest the Criminal Court of jurisdiction are punishable by less than six months imprisonment. The technical complexity of the statute amply demonstrates the need for counsel so as to avoid an unwarranted application of the criminal process to a family dispute.

16. 35,166 cases were disposed of in miscellaneous fashion and do not here concern us since they did not deal with the merits of the charges; *i.e.,* cases in which the Society was relieved of its initial assignment or where pleas were entered under other charges.

17. 3,891 cases were disposed of in miscellaneous fashion. See n. 16 above.

whelmingly greater proportion of persons charged with less serious offenses [45%] either have their cases dismissed or are acquitted than is the case with felony prosecutions [9%]. Thus we know that the prevalence of legal insufficiency and outright innocence is far greater in the lesser offense category.[18]

With respect to cases which resulted in conviction, our figures comparing our results on appeal in lesser offense cases with felony convictions for the years 1969 and 1970 also tell us much about the lesser offense process:

	1969	*1970*
Appeals to Appellate Divisions resulting in decision (felony)	412	481
Affirmed	376	430
Reversed or modified	36	51
Percent reversed or modified	9%	11%

* * *

	1969	*1970*
Appeals to Appellate Terms resulting in decision (misdemeanor and violation)	187	228
Affirmed	107	149
Reversed or modified	80	79
Percent reversed or modified	42%	35%

18. Our figures, of course, do not indicate what the results would be in a system where counsel was not furnished. As New York has long afforded counsel to lesser offenders except for traffic infractions [see n. 1 *supra*], we have no way of making a comparative analysis. For the Court's interest, however, we are annexing as Appendix A, a study made by the American Civil Liberties Union of Nevada which does offer some comparative analysis of defended *vis a vis* undefended cases—the subject of the study being the Police Court in Reno, Nevada.

It is evident therefore, that the incidence of reversal on appeal from a misdemeanor or violation conviction is far greater than in felony cases, signifying that (1) the occurrence of legal error in the trial of a lesser offense is far more frequent than in a felony trial; (2) the chances of imprisonment based upon legal error is three to four times as great in lesser offense prosecution; (3) the chance that an innocent person will be convicted in the lower court far exceeds that in a felony case. [In not one of the 87 Appellate Division reversals above, was the ground for reversal the failure of the People to prove the defendant's guilt beyond a reasonable doubt. Of the Appellate Term reversals over the two years, approximately 40% were on the ground that the prosecution failed to establish guilt beyond a reasonable doubt.]; (4) as each defendant was represented by counsel, the ground for reversal was often protected, thereby signifying the critical role of counsel.[19]

Our experience with lesser offense prosecution enables us to make a number of other observations about the criminal court process that renders the need for counsel imperative.

The majority of the defendants in the lower criminal courts are the urban poor and mainly of minority extraction. In New York, the minority groups most heavily involved

19. Even where specific objection was not made, cross-examination of the People's witnesses developed the record so as to enable counsel to advance grounds for reversal for the first time on appeal. New York law is liberal on this aspect of its practice. Code Crim. Proc. §520; *People* v. *McLucas,* 15 N.Y. 2d 167, 204 N.E. 2d 846 (1965); *People* v. *Arthur,* 22 N.Y. 2d 325 239 N.E. 2d 537 (1968). Of course, the importance of counsel on appeal in less serious offenses is an independent issue and we would respectfully urge the relevance of our appeals data to the issue presented in *Mayer* v. *City of Chicago,* Oct. Term, 1970, No. 6061, prob. juris. noted, Feb. 22, 1971.

are, of course, those of black and Puerto Rican heritage. The Criminal Court thus plays a very large part in the lives of many of the urban poor, and even with counsel guaranteed by New York law, the belief is widespread among the impoverished and minority group residents of the City's ghettos who enter the courtrooms of the Criminal Court either as defendants or as relatives and friends of defendants, that justice is dispensed on an assembly-line basis.[20] We doubt that the perpetuation throughout the country of systems where not even counsel is present can be a step towards improving this unsatisfactory state of affairs.

A sampling of the appeals which the Criminal Appeals Bureau handled during the past two years also points up various aspects of the lesser offense process which render Mr. Justice Sutherland's appraisal of the role of counsel especially applicable to this category of cases.

1. Many of the crimes prosecuted are of the "low visibility" variety—police crimes such as loitering, vagrancy and disorderly conduct, which, by their very nature, are replete with serious legal issues ranging from the sufficiency of the evidence to the constitutionality of the statute involved.[21]

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20. See, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (Bantam Ed. 1968); Wright, *The Courts Have Failed the Poor,* N.Y. Times [Magazine] March 9, 1969, p. 100.

21. See, Douglas, *Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1 (1960); Foote, *Vagrancy-Type Law and its Administration,* 104 U. Pa. L. Rev. 603 (1956); Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like,* 3 Crim. L. Bull. 205 (1968); see also, *Coates* v. *City of Cincinnati,* No. 1370, October Term, 1969.

In *Sibron* v. *New York,* 392 U. S. 40 (1968), the Court specifically adverted to this aspect of the criminal process:

> Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for minor offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. 392 U. S. at 53.

Accordingly, many reversals have been obtained because of the fertile ground provided in these cases for legal error.[22] And on numerous occasions, constitutional challenges to the statutes themselves have been made by trial

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22. In *People* v. *Peters,* New York Law Journal, Jan. 7, 1971, p. 2, col. 1 (App. Term, 1st Dept.), the court reversed a conviction for public lewdness, a class B misdemeanor [P.L. §245.00] on the ground that proof of guilt was not established beyond a reasonable doubt. The function performed by trial counsel was critical because the reversal was based upon inconsistencies between the arresting officer's testimony at trial and his entries on his arrest card which were brought out on cross-examination.

In *People* v. *Schwartz,* New York Law Journal, Dec. 17, 1970, p. 2, col. 1 (App. Term, 1st Dept.), a conviction for disorderly conduct [P.L. §240.20] was reversed because the People failed to prove that defendant's conduct was sufficient to establish a risk of public inconvenience or harm. Here, the defendant had originally pleaded guilty without counsel, which plea was vacated by counsel immediately upon his assignment.

In *People* v. *Heins,* New York Law Journal, Oct. 26, 1970, p. 2, col. 3 (App. Term 1st Dept.) the defendant's loitering conviction was overturned, the court finding that his lingering in a restroom was neither unduly long, nor tainted with conduct indicative of prohibited activity. The defendant had been reading a newspaper while awaiting his turn to use the toilet.

In *People* v. *Brown,* New York Law Journal, Oct. 10, 1969, p. 2, col. 4 (App. Term, 1st Dept.), another loitering conviction was

and/or appellate counsel [23] This Court, of course, has had its own opportunities to observe, at close hand, the manner in which statutes of this kind are utilized. See, *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962); *Fields* v. *City of Fairfield*, 375 U. S. 218 (1963); *Barr* v. *City of Columbia*, 378 U. S. 146 (1964); *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965).

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overturned with a holding that "no law brands one as a loiterer who enters a subway station and fails to take the first train to his destination * * *."

In *People* v. *McCaskill*, New York Law Journal, June 26, 1970, p. 2, col. 3 (App. Term, 1st Dept.), a conviction for obstructing vehicular traffic was reversed [P.L. §240.20(5)] where the defendant, while crossing the street was brushed by a car driven by a plain-clothes detective who did not take kindly to the surprise and anger expressed by the defendant. At trial, counsel was able to establish that this had been the basis for the filing of the complaint.

23. In *People* v. *Beltrand*, 63 Misc. 2d 1041, 314 N.Y.S. 2d 276 (Crim. Ct. N.Y. Co. 1970) trial counsel challenged the constitutionality of a section of New York's loitering statute [P.L. §240.35 (6)] which makes it a crime to "loiter * * * in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime." The trial court declared the statute unconstitutional. An appeal by the Attorney General is pending.

In *People* v. *Harris*, 64 Misc. 2d 510, 315 N.Y.S. 2d 66 (App. Term, 1st Dept., 1969) a challenge to New York's fraudulent accosting statute [P.L. §165.30] was sustained. See, also, *Fenster* v. *Leary*, 20 N.Y. 2d 309, 229 N.E. 2d 419 (1967) [New York's vagrancy statute held unconstitutional]; but see, *People* v. *Pagnotta*, 25 N.Y. 2d 333, N.E. 2d 202 (1970) sustaining the constitutionality of New York's former loitering for the purpose of using narcotics statute. However, on November 2, 1970, the five New York City District Attorneys told the Police Department that a vast majority of the arrests made under the successor statute [P.L. §240.36] have been "unwarranted and unlawful." The New York County District Attorney's office dismissed 89 per cent of 1,802 narcotic loitering arrests in three months. *N.Y. Times*, Nov. 2, 1970, p. 49, col. 6.

2. Apart from the fact that in many lesser offense prosecutions the defendant is actually innocent, it is also true that most frequently the court has before it a person who is not a hardened criminal. The defendant might be a person who became involved in a little neighborhood scuffle, or looked a little slovenly in a subway station, or picked a garment from a department store counter intending to pay for it on another floor.[24] It is to these persons that the criminal court process can be most traumatic and disruptive. See, Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal,* 38 Legal Aid Briefcase 151, 153 (1970).

3. In many cases, procedural and substantive complexities are as prevalent as in felony cases. This is especially true in lesser sex offense cases, cases with difficult problems of statutory construction, and all cases where the

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24. Again several of our recent cases are representative. In *People* v. *Markowitz,* 18 N.Y. 2d 953, 223 N.E. 2d 572 (1966), the defendant, without counsel, was convicted of selling scorecards in front of Yankee Stadium without a license and fined $6.00. Assigned to the appeal, our office pointed out that the defendant had actually applied for a license but had been told that he didn't need one because he was selling printed matter and urged that it was improper to convict a person who makes a bona fide attempt to comply with the law. The Court of Appeals reversed unanimously on due process grounds citing the decision of this Court in *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

In *People* v. *Williams,* New York Law Journal, April 18, 1968, p. 2, col. 2 (App. Term, 1st Dept.), the defendant was convicted for loitering in a subway station. He testified that he had been pulled from a telephone booth after placing a call to his employer. In rebuttal, the officer testified that there was no phone booth on that platform. On appeal, counsel obtained certification from the Transit Authority that indeed there were two phone booths at the station. The conviction was reversed.

legality of police conduct pertaining to searches and seizures or confessions is involved.[25]

4. In many instances, the People's case is based upon perjured police testimony and counsel has a significant role in protecting the defendant against its use. This is particularly true of minor narcotic prosecutions, where to c..-

25. In *People* v. *Hanna*, New York Law Journal, July 19, 1968 (App. Term, 2d & 11th Jud. Dist.), a conviction for sexual abuse in the third degree, a class B misdemeanor [P.L. §130.55] was reversed because the complainant testified to an uncorroborated rape. The record was protected by trial counsel's timely motion for dismissal for lack of corroboration. Similar results were reached in *People* v. *Tolliver*, New York Law Journal, June 17, 1970, p. 2. col. 5 (App. Term, 1st Dept.) and *People* v. *Soto*, New York Law Journal, Nov. 3, 1969, p. 2. col. 1 (App. Term, 1st Dept.). That an unrepresented defendant would have known of this complex aspect of the law is highly dubious.

In *People* v. *Salgado*, New York Law Journal, April 6, 1970, p. 2, col. 2 (App. Term, 1st Dept.), a conviction for endangering the welfare of a minor was reversed because guilt had not been established beyond a reasonable doubt, the court pointing out that the People's case rested upon the uncorroborated testimony of a minor.

With respect to issues of illegal search and seizure, no case is more representative than *Sibron* v. *New York*, 392 U.S. 40 (1968). an appeal which involved a New York City Criminal Court conviction for possession of narcotics. Indeed, it was in *Sibron* that the Court also noted the seriousness of a misdemeanor conviction with respect to the question of mootness. 392 U.S. at 56. See also, *People* v. *White*, 16 N.Y. 2d 270, 213 N.E. 2d 438 (1965), cert. den. 386 U.S. 1008 (Warren, Douglas, Fortas of the op. cert. should be granted). Of course, many cases in the Criminal Court continue to present either new Fourth Amendment issues [*e.g. People* v. *Whitehurst*, 25 N.Y. 2d 389, 254 N.E. 2d 905 (1969); *People* v. *Anderson*, 24 N.Y. 2d 12, 246 N.E. 2d 508 (1969); *People* v. *Rosemond*, 26 N.Y. 2d 101, 257 N.E. 2d 23 (1970); *People* v. *Butterly*, 25 N.Y. 2d 159, 250 N.E. 2d 340 (1969)] or instances where trial judges refuse to comply with appellate court decisions. *People* v. *Delgado*, New York Law Journal, Dec. 17, 1970, p. 2, col. 1 (App. Term, 1st Dept.) is of particular relevance because it is another example wherein trial counsel was instrumental in laying the ground for reversal when he renewed a motion to suppress at trial after it became clear that the police officer had given different testimony on the issue of abandonment at the suppression hearing.

cumvent this Court's decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), police officers have resorted to what has come to be known as "dropsy" testimony—statements to the effect that upon the officer's approach, the defendant dropped narcotics to the ground, constituting an abandonment and thereby giving the officer probable cause to arrest him.[26]

5. Counsel is also integral to any process which relies heavily upon the entry of guilty pleas. *Evans* v. *Rives,* 126 F. 2d 633, 637 (D.C. Cir. 1942) As our own figures demonstrate, the overwhelming number of convictions in the lesser offense area as well as in felony cases are secured through guilty pleas. As long as our system depends upon this manner of disposition to avoid even greater calendar-clogging, the guiding hand of counsel is essential. *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927); *Boykin* v. *Alabama,* 395 U.S. 238 (1969). It is counsel who provides expert evaluation of the appropriateness of the guilty plea and assistance to the defendant in obtaining charge and sentence leniency by plea negotiation. Counsel's skills are as important in plea negotiation as they are at trial. Newman, CONVICTION, 198 (1966). Indeed, counsel's involvement in the plea process has frequently permitted a Court to feel secure in the belief that a plea had properly

26. Presently pending before the New York Court of Appeals are a series of appeals prosecuted by the Society's Appeals Bureau in which the court is asked to shift to the People the burden of proof at a suppression hearing where they rely on "dropsy" testimony. The District Attorney for New York County has conceded that perjury is blatant in these types of cases, as well as others and has joined in our request for relief. *People* v. *Berrios* (argued before the New York Court of Appeals on March 2, 1971). See Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices,* 1960-62, 4 Crim. L. Bull. 549 (1968); *Police Practices in Narcotics Cases,* 4 Colum. J. Law & Soc. Prob. 87 (1968).

been entered. Compare, *People* v. *Nixon,* 21 N.Y. 2d 338, 234 N.E. 2d 687, cert. den. *sub nom., Robinson* v. *New York,* 393 U.S. 1067 with *People* v. *Seaton,* 19 N.Y. 2d 404, 227 N.E. 2d 294 (1967); see *McMann* v. *Richardson,* 397 U.S. 759, 771 (1970).

There are, no doubt, still additional reasons why counsel should not be denied an indigent facing a charge punishable by imprisonment and the factors discussed in this brief should not be deemed exhaustive. For example, the collateral consequences of lesser offenses are frequently as severe to a poor person as are those which attend a conviction for felony since they affect a person's qualifications for various occupational callings and eligibility for public housing. See Appellant's Brief, *Baldwin* v. *New York, supra,* 399 U.S. 66, pp. 26-28, Appendix C, pp. C-1-C-6. As one federal court has recently also observed, "[a]ny incarceration of over thirty days, more or less, will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family." *Marston* v. *Oliver,* —— F. Supp. —— (E.D. Va. 3/10/71) 8 Cr. L. Rep. 2457-8.

The need for counsel's assistance to secure release on bail pending appeal is also critical, especially in view of the high percentage of reversals that is obtainable upon appeals in these types of cases.

In sum, the key issue is whether, given the hard facts about the lower criminal courts in our country, with their poor processes and high incidence of miscarriage of justice, this Court can still feel assured that without counsel, the fairness of the trial process, which is the matrix of our

entire system, will, nonetheless, be secured to the indigent. For the reasons stated above, we think this is impossible and thus, that no man should be condemned to prison[27] for as long as six months without a fair trial, for which the assistance of counsel is an indispensable precondition.

Conclusion

It is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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The Legal Aid Society
Counsel for Amicus Curiae

27. Another fact of life at this level is the atrocious conditions that exist in County and Municipal Jails where most lesser sentences are served. See, Note, *Constitutional Limitations in the Conditions of Pretrial Detention,* 79 Yale L.J. 941, 943-47 (1970); *Jones* v. *Wittenberg,* mem. op. #C70-388 (N.D. Ohio, 1971).

Appendix A

American Civil Liberties Union Study Comparing Defended vs. Undefended Cases in Police Court, Reno, Nevada

A Preliminary Report

LEGAL COUNSEL FOR MISDEMEANANTS

A Comparison of Defended vs. Undefended Cases in Police Court

Reno, Nevada October-December 1970

A Study by the
American Civil Liberties Union of Nevada

Misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.

This finding emerged from a 10-week observation of proceedings in the Reno Municipal Court from October into December 1970. An extensive analysis of the several thousand hearings and trials will be completed later in 1971. In the meantime a preliminary comparison of defended vs. undefended cases is presented here.

In order to make valid comparisons, each person with a defense attorney was matched with undefended cases of like sex, age and race who faced the same charges. Special characteristics such as beards or long hair were also taken into account in the matching process whenever possible.

Of the 72 cases who had legal counsel which reached conclusion during the observation period, 50 involved one charge, nine persons had two charges against them, and 13 faced three or more charges. Matching cases were not only equated for type of charge but also for the number of charges.

Nontraffic Charges

Misdemeanors in the nontraffic category include such charges as public intoxication, vagrancy, disorderly person, disturbing the peace, resisting arrest, interfering with an officer, assault and battery, obscene language, contributing to the delinquency of a minor, petty theft and the like.

Chief finding was that 46 percent of the people who had lawyers, but only five percent of the undefended comparable nontraffic cases were dismissed, or a favorable ratio for defended cases of 9-to-1. (Table 1)

Traffic Charges

Having a lawyer in court made less difference to the client in the disposition of traffic cases. All defendants were considerably more likely to be given an immediate penalty for traffic violations. Defended persons were twice as likely as undefended to have all charges dismissed. (Table 2)

Percent given immediate penalties in traffic and nontraffic cases are compared below for the defended and the undefended:

	Percent Given Immediate Penalty	
	Traffic Charges	*Nontraffic Charges*
Defended cases	62%	37%
Undefended cases	84	57

Pleas

Guilty pleas were made by only four percent represented by counsel in contrast to 68 percent among those without attorneys. (Table 3)

Twenty-eight percent of the pleas entered through attorneys were changed from not guilty to guilty compared with only eight percent of those undefended, perhaps evidence of greater plea bargaining by counsel.

One-third of the defended charges compared to three-quarters of the undefended eventually resulted in guilty pleas.

But even when like pleas are compared, it pays a defendant to have an attorney in court. Not only did attorneys present more non-guilty pleas, but got more of them dismissed. Of all the not-guilty pleas, 71 percent of the defended, but only 37 percent without counsel resulted in the charges being dismissed. (Table 4)

SUMMARY

The following figures summarize the effects of legal representation on the disposition of all types of misdemeanor cases in this police court:

Charges were:	*Attorney Defended Cases*	*Comparable Undefended Cases*
Dismissed	35%	7%
No immediate penalty	15	29
Immediate penalty	50	64
Total percent	100%	100%

TABLE 1

DISPOSITION OF NONTRAFFIC CHARGES IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases*

Disposition of Charges	*Percent of Persons*		
	Attorney Defended Cases		*Comparable Undefended Cases*
All charges were:			
Dismissed	46%		5%
Given time served	–		9
Either dismissed, given time served, or continued	8		2
Continued with possible penalty	9		27
TOTAL NOT GIVEN IMMEDIATE PENALTY		63%	
One or more charges were given:			
Fine only	3%		1%
Fine or time in jail	28		41
Fine or time, plus mandatory time	6		7
Time only	–		8
TOTAL GIVEN IMMEDIATE PENALTY		37	
TOTAL PERCENT		100%	
TOTAL NUMBER OF PERSONS		35	

* Defended cases were matched to other cases on the following factors, and in priority shown:

(1) Number and type of charge
(2) Race
(3) Sex
(4) Age
(5) Facial foliage of men

TABLE 2

DISPOSITIONS OF TRAFFIC CHARGES IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases*

Disposition of Charges	Percent of Persons: Attorney Defended Cases		Percent of Persons: Comparable Undefended Cases	
All charges were:				
Dismissed	24%		12%	
Suspended, dismissed or continued	14		4	
TOTAL NOT GIVEN IMMEDIATE PENALTY		38%		16%
One or more charges were given:				
Reduced charge and penalty	5%		–	
Some dismissed, some penalized	11		4%	
Forfeited bail	8		1	
Fine only	–		1	
Fine or time in jail	22		50	
Penalty including mandatory traffic school	13		24	
License suspended plus penalty	3		1	
TOTAL GIVEN IMMEDIATE PENALTY		62		84
TOTAL PERCENT		100%		100%
TOTAL NUMBER OF PERSONS		37		121

*Defended cases were matched to enter cases on the following factors, and in the priority shown:

(1) Number and type of charge
(2) Race
(3) Sex
(4) Age
(5) Facial foliage of man

TABLE 3

PLEAS TO TRAFFIC AND NONTRAFFIC CHARGES IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases

	TRAFFIC		NONTRAFFIC		TOTAL	
Pleas	*Defended*	*Undefended*	*Defended*	*Undefended*	*Defended*	*Undefended*
Not guilty	30%	10%	33%	11%	31%	11%
Changed from not guilty to guilty	26	5	30	11	28	8
Guilty	2	65	6	70	4	68
All other pleas	8	3	2	2	5	2
No plea, plea unknown	34	17	29	6	32	11
TOTAL PERCENT	100%	100%	100%	100%	100%	100%

TABLE 4

PENALTY BY PLEA IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases

Penalty	Percentage of Pleas		
	Not Guilty	*Changed Not Guilty to Guilty*	*Guilty*
NONTRAFFIC			
Defended cases			
Dismissed	78%	—	a
No immediate penalty	6	40%	a
Immediate penalty	16	60	a
Total percent	100%	100%	100%
Undefended cases			
Dismissed	62%	3%	4%
No immediate penalty	21	47	40
Immediate penalty	17	50	56
Total percent	100%	100%	100%
TRAFFIC			
Defended cases			
Dismissed	65%	25%	a
No immediate penalty	6	25	a
Immediate penalty	29	50	a
Total percent	100%	100%	100%
Undefended cases			
Dismissed	18%	—	4%
No immediate penalty	5	43%	1
Immediate penalty	77	57	95
Total percent	100%	100%	100%
ALL TYPE CASES			
Defended cases			
Dismissed	71%	13%	a
No immediate penalty	6	32	a
Immediate penalty	23	55	a
Total percent	100%	100%	100%
Undefended cases			
Dismissed	37%	2%	4%
No immediate penalty	15	46	22
Immediate penalty	48	52	74
Total percent	100%	100%	100%

a. Too few cases.